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MICHAEL RODAK, JR

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 74-1340

HOTEL, RESTAURANT EMPLOYEES AND BARTENDERS' UNION, LOCAL 5, AFL-CIO, *Petitioner,*

vs.

INTER-ISLAND RESORTS, LTD., d/b/a KONA SURF HOTEL, and ILWU, LOCAL 142,
and
NATIONAL LABOR RELATIONS BOARD, *Respondents.*

BRIEF FOR RESPONDENT ILWU LOCAL 142 in opposition to Petition for Writ of Certiorari

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Comes now ILWU Local 142, one of the respondents, and submits its brief in opposition to the Petition for Writ of Certiorari herein.

OPINIONS BELOW

The opinion of the National Labor Relations Board in NLRB Case Nos. 37-CA-689 and 37-CB-147 is ap-

pended to the Petition for Writ of Certiorari as Appendix "B" thereof.

The opinion of the Court of Appeals for the Ninth Circuit on the petition for enforcement filed by the National Labor Relations Board is appended to the Petition for Writ of Certiorari as Appendix "A" thereof.

The order of the National Labor Relations Board subsequent to the foregoing opinion of the Court of Appeals for the Ninth Circuit is appended to this Brief as Appendix "A".

JURISDICTION

Petitioner lacks standing to file a Petition for Writ of Certiorari. It was not a party to the enforcement proceedings in the Court of Appeals for the Ninth Circuit. It also neglected to file a motion to intervene in the proceedings thereafter for the purpose of filing a Petition for Writ of Certiorari. Furthermore, Respondent National Labor Relations Board has accepted the decision of the Court of Appeals as the law applicable to the case and has no petition pending before this Court.

QUESTIONS PRESENTED

The questions presented are:

1. Whether the Court can entertain a petition for writ of certiorari filed by a petitioner who was not a party to proceedings before the Court of

Appeals and who has not filed a motion to intervene in the proceedings for the purpose of filing a petition for writ of certiorari;

2. Whether the Court should entertain a Petition for Writ of Certiorari in an unfair labor practice case where the National Labor Relations Board has accepted the decision of the Court of Appeals as the applicable law in the case and has not petitioned for certiorari;

3. Whether the Court should entertain a Petition for Writ of Certiorari where there is no conflict in the decisions of the various Courts of Appeals on the legal issue litigated in the unfair labor practice case;

4. Whether an employer and a labor organization commit an unfair labor practice by executing and giving effect to a collective bargaining agreement after the labor organization has clearly demonstrated its majority status, a status attained without coercive conduct, and after another labor organization has filed a petition for a representation election but has not demonstrated an interest sufficient to raise a question concerning representation under the procedures of the National Labor Relations Board.

STATEMENT OF CASE

The case was submitted to the Board on a written stipulation of facts and the fact summary from the decision of the Court of Appeals is a concise and correct summary of the facts. It reads:

"There are no relevant facts in dispute since the Board's decision was based on a written stipulation of the facts entered by the parties. Inter-Island Resorts, Ltd., is a Hawaii corporation which operates several hotels in that state. In 1970 Inter-Island began construction of the Kona Surf Hotel on the island of Hawaii. The hotel was scheduled to open in the early fall of 1971. In early September, 1971, respondent company formally hired and placed 95 employees on the Kona Surf payroll. The respondent union, which represented employees at six other hotels operated by Inter-Island, requested recognition as the exclusive bargaining representative of the employees, based on a cross-check of union authorization cards. The same day, another union, the Hotel Employees Union, filed a petition for a representation election with the Board, accompanied by 36 authorization cards, of which only 24 were valid.

Despite the Hotel Employees' petition, Inter-Island and ILWU met the next day at which time the latter submitted 87 authorization cards. Mack Hamada, Chairman of the Hawaii Public Relations Board, cross-checked the cards and approved 84 of them as valid. Inter-Island then recognized ILWU as the exclusive bargaining representative of the employees, and the parties entered into a collective bargaining agreement identical to a master agreement in effect at the six other hotels operated by Inter-Island. Pursuant to a decision by the Regional Director for the Board's 20th Region, an election was scheduled notwithstanding the Inter-Island contract with ILWU. When the election to decide the issue of employee representation was held, 62 votes were

> cast for the ILWU, 27 votes were cast for the Hotel Employees Union and 1 vote was cast against both unions."
>
> *NLRB v. Inter-Island Resorts, et al.*, 507 F.2d 411, 412.

Petitioner's statement also omits facts which the Court of Appeals thought crucial. The crucial paragraph from the fact stipulation reads:

> "During the entire period pertinent hereto, there is no evidence, nor does the General Counsel contend, that the Union authorization cards obtained by Respondent Union and relied upon by the Respondent Employer in granting recognition to the Respondent Union were obtained by any conduct which was coercive in nature or in any other way unlawful. It is further agreed that there is no evidence, nor does the General Counsel contend, that Respondent Employer unlawfully denied Charging Party equal access with Respondent Union to its employees for the purpose of obtaining authorization cards from Respondent Employer's employees. The alleged unlawful conduct on the part of Respondent Employer was its entering into a collective bargaining agreement with Respondent Union and thereafter administering the same as hereinabove set forth, at a time when a question concerning representation allegedly existed by virtue of the filing of a petition by the Charging party."
>
> NLRB Record, p. 74.

Petitioner further fails to mention that no question on the validity of the collective bargaining agreement was raised by itself or the Board at any time before respondent union won the Board-conducted election.

ARGUMENT

PETITIONER LACKS STANDING TO FILE A PETITION FOR WRIT OF CERTIORARI

Petitioner attempts to establish standing before the Court by bald assertions that the issue of a charging party's right to file a Petition for Certiorari "appears to be one of first impression" and that a charging party "should have a right to appeal an adverse decision of a Court of Appeals (Petitioner's Brief, p. 12)", citing neither precedent nor authority in support thereof.

Contrary to petitioner's contention, the issue of a charging party's standing to appeal has been determined. In *International Union, Local 283 v. Scofield,* 382 U.S. 205, 15 L.Ed.2d 272, 86 S.Ct. 373, one of the primary issues was whether successful charging parties in unfair labor practices proceedings before the National Labor Relations Board should be permitted to intervene in proceedings for review or enforcement of Board orders. The question was answered in the affirmative by the Court. In discussing the "rights typically secured to an intervenor in a reviewing court," the Court delineated the following rights attached to intervenor status:

> "to participate in designating the record; to participate in prehearing conferences preparatory to simplification of the issues, to file a brief, to engage in oral argument, to petition for rehearing in the appellate court or to this Court for certiorari"
>
> 382 U.S. 205, 215.

A charging party's rights on appeal are thus not in issue and it is not a lack of precedent which deprives petitioner of standing before the Court.

Petitioner as the successful charging party in the unfair labor practice proceeding elected not to intervene in the Board's petition for enforcement before the Court of Appeals for the Ninth Circuit. It further neglected to move for leave to intervene in the proceedings for the limited purpose of filing a Petition for Writ of Certiorari. Its own default, and not an absence of precedent or authority, stands as a bar to petitioner herein.

Under §1254(1) of the Judicial Code,[1] "only a 'party' to a case in the Court of Appeals may seek review" in the Supreme Court. *International Union, Local 283 v. Scofield,* 382 U.S. 205, 209; *Ex parte Leaf Tobacco Board,* 222 U.S. 578, 581, 56 L.Ed. 323. As petitioner neglected to intervene in the proceedings below, it has no standing to maintain this appeal. *Railroad Trainmen v. Baltimore and Ohio Railroad Co.,* 331 U.S. 519, 524, 91 L.Ed. 1646, 1650, 67 S.Ct. 1387, 1390. Interest in a case, of itself, cannot create a right to seek review of a decision of the Court of Appeals.

[1] 28 U.S.C. §1254(1).

THE BOARD HAS ACCEPTED THE DECISION OF THE COURT OF APPEALS AS THE APPLICABLE LAW AND THE COURT SHOULD NOT ENTERTAIN A PETITION FOR WRIT OF CERTIORARI FILED BY A CHARGING PARTY.

Subsequent to the decision of the Court of Appeals, the Board issued an order, attached to this Brief as Appendix "A", covering Case Nos. 37-CA-689, 37-CB-147, and 37-RC-1711, wherein it found "itself constrained to accept as the law of said cases" the decision of the Court of Appeals of the Ninth Circuit. This decision not to seek further review should not be disturbed by the Court.

The NLRB has been invested by Congress with exclusive power in the area of employee representation. "The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining and by protecting the 'exercise by workers of full freedom of association, self organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment' ". *National Licorice Co. v. NLRB,* 309 U.S. 350, 362, 84 L.Ed. 799, 810. Where the Board in exercising its exclusive power and in its discretion and judgment has accepted the decision of the Court of Appeals "that the rights of the employees to select and bargain through their own representatives prevailed over the Board's desire to protect the integrity of its election machinery", this Court should not review said decision. The Board's tactical determination that the case is not "an appropriate vehicle to raise

important issues" must also be accorded due consideration. See: *International Union, Local 283 v. Scofield,* 382 U.S. 205, 221-222.

THERE IS NO CONFLICT IN THE DECISIONS OF THE VARIOUS COURTS OF APPEALS ON THE LEGAL ISSUE INVOLVED

Certiorari is a discretionary writ and the exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals has been sparingly exercised. Among the purposes for the exercise of such exceptional power is the resolution of an asserted conflict among the circuits on a particular issue. See: *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 10 L.Ed. 2d 308, 83 S.Ct. 1139; *NLRB v. Burnup & Sims, Inc.,* 379 U.S. 21, 13 L.Ed.2d 1, 85 S.Ct. 171.

Petitioner asserts no conflict among the various circuits on the legal issue involved. As the decision of the Court of Appeals and the cited cases indicate, the Courts "which have dealt with the issue have consistently refused to find a violation . . . where an employer has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support". *NLRB v. Inter-Island Resorts,* 507 F.2d 411, 412. The foregoing circumstances do not call for the use of the exceptional power of review.

THERE WAS NO UNFAIR LABOR PRACTICE COMMITTED BY RESPONDENTS INTER-ISLAND RESORTS, LTD., AND ILWU LOCAL 142.

Employees are accorded basic guarantees of freedom of choice and majority rule by the National Labor Relations Act in the selection of their collective bargaining representative. The unfair labor practices described in Section 8 of the Act are intended to facilitate the enforcement of the foregoing principles of freedom of choice and majority rule. Section 8 imposes a duty of neutrality upon the employer while employees are in the process of selecting a representative but when the choice of a representative by a majority of the employees has been made and proved to the employer, the duty becomes one of recognizing the majority choice. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 23 L.Ed.2d 547, 89 S.Ct. 1918; *NLRB v. Indianapolis Newspapers, Inc.*, 210 F.2d 501, 504. The requirement of employer neutrality to promote freedom of choice is displaced by a necessity to enforce majority rule through employer recognition of the majority representative.

This case involves a situation where the respondent union clearly demonstrated its majority status prior to recognition by respondent employer and the execution of a collective bargaining agreement. The majority support was achieved without resort to coercion or other unlawful means. The alleged basis of the unfair labor practice, the petition for a representation election of the charging party, although filed prior to the execution of the collective bargaining agreement, was unaccompaned by a showing of employee support

sufficient to warrant its processing under Board standards (See: Petitioner's Brief, Appendix 'A', p. viii). Under such circumstances, the basic guarantees of freedom of choice and majority rule could not have been abridged by respondents and their action in executing the agreement was in accord with the foregoing principles.

The decisive question in a case involving employee representation is whether there has been an uninfluenced expression of majority will. *Modine Manufacturing Co. v. NLRB,* 453 F.2d 292; *American Bread Co. v. NLRB,* 411 F.2d 147. Where such an expression is found, as in this case, Courts have not seen fit to hold contracting employers and unions in violation of the National Labor Relations Act. It is "interference with the employees' choice, not frustration of the Board's design to hold an election, which the statute proscribes as an unfair labor practice. And the latter is not necessarily determinative of the former". *NLRB v. Air Master Corp.,* 339 F.2d 553, 556.

The rationale for the reluctance of the Courts of Appeals to uphold unfair labor practice charges in the fact situation involved was succinctly stated by the Court of Appeals for the Seventh Circuit in *Playskool, Inc. v. NLRB,* 477 F.2d 66, where the Court said:

> "The courts, on the other hand, have generally refused to find a violation of §8(a)(2) where an employer has recognized one of two unions competing for exclusive recognition on the basis of a clear demonstration of majority support. N.L.R.B. v. Peter Paul, Inc., 467 F.2d 700

(9th Cir. 1972), Modine Manufacturing Co. v. N.L.R.B., 453 F.2d 292 (8th Cir. 1971), American Bread Co. v. N.L.R.B., 411 F.2d 147 (6th Cir. 1969), Iowa Beef Packers v. N.L.R.B., 311 F.2d 176 (8th Cir. 1964). The courts have reasoned that, in extending recognition to a union on such a showing, the employer has not 'coerced or interfered with' the minority union, but has merely obeyed the duty imposed upon him to recognize the agent which his employees have designated. N.L.R.B. v. Indianapolis Newspapers, Inc., 210 F.2d 501, 503 (7th Cir. 1954). Thus, many decisions recognize that, however important the need to preserve the integrity of the Board's election machinery, courts must protect the right of employees to select and bargain through their own representative without undue delay. Courts have also sought to implement the congressional purpose of promoting labor peace underlying the National Labor Relations Act, and have accepted a majority showing by the victorious union as a means of terminating the instability inherent in a representation contest and preventing a minority union from frustrating the majority will in order to gain campaigning time. N.L.R.B. v. Peter Paul, Inc., 467 F.2d at 702, N.L.R.B. v. Indianapolis Newspapers, Inc., 210 F.2d at 503, Getman, The Midwest Piping Doctrine: An Examination of the Need for a Reappraisal of Labor Board Dogma, 31 U.Chi.L.Rev. 292, 305 (1964)."

477 F.2d 66, 70.

Where majority status was clearly demonstrated prior to the execution of a collective bargaining agreement, the purpose of the National Labor Relations Act to protect the right of employees to select and

bargain through their own representative without undue delay has not been frustrated and no unfair labor practice has been committed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated, Honolulu, Hawaii,
May 14, 1975.

Respectfully submitted,
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ILWU Local 142.

BOUSLOG & SYMONDS,
Of Counsel.

(Appendix "A" Follows)

Appendix "A"

Honolulu, Hawaii

United States of America
Before the National Labor Relations Board

Inter-Island Resorts, Ltd., d/b/a Kona Surf Hotel, and Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL-CIO, ILWU Local 142, and	Case 37-CA-689
Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL-CIO, Inter-Island Resorts, Ltd., operator of Kona Surf Hotel, Employer, and	Case 37-CB-147
Hotel, Restaurant Employees & Bartenders' Union, Local 5, AFL-CIO, Petitioner.	Case 37-RC-1711

Order

On September 3, 1971, the Petitioner filed a petition for an election herein in a unit consisting of all employees employed by the Employer at the Kona Surf Hotel, with certain exceptions. On September 4, 1971, the Employer, based upon a card check, granted recognition to ILWU, Local 142 as the exclusive collective-bargaining representative of the em-

ployees sought in the petitioned-for unit and thereafter executed a contract with said union covering those employees. On October 21, 1971, the Regional Director for Region 20 issued a Decision and Direction of Election directing an election in the aforesaid unit on the grounds that the contract did not bar the election since the petition's filing preceded its execution, and a question concerning representation existed when such contract was signed. On December 2, 1971, the Board denied the Employer's Request for Review, and on December 21, 1971, a Board-conducted election was held, resulting in 27 votes cast for the Petitioner, 62 votes cast for Local 142, and 1 vote cast for neither union, with 1 nondeterminative challenged ballot. On December 27, 1971, the Petitioner filed timely objections to conduct affecting the results of the election.

On January 26, 1972, the Petitioner filed unfair labor practice charges in Cases 37-CA-689 and 37-CB-147 against the Employer and Local 142, respectively, and on May 1, 1972, the Regional Director issued a consolidated complaint in said cases alleging that the above respondent parties were engaging in conduct violative of Sections 8(a)(3), (2), and (1) and 8(b)(4)(A) and (2), respectively, based upon the Employer's recognizing Local 142 and executing with it a contract containing a union security clause. On May 1, 1972, the Regional Director issued a supplemental Decision and Order herein in which, *inter alia,* he consolidated for hearing certain of the objections to the election with the unfair labor practice case described above.

On June 22, 1972, the Board issued an order aproving the parties' stipulation of facts and transferring the consolidated proceeding to it for an appropriate Decision and Order. On January 10, 1973, the Board issued its Decision, Order, and Direction of Second Election in said consolidated proceeding wherein it found, *inter alia,* that a real question concerning representation existed on September 4, 1971, when the Employer recognized and executed the collective-bargaining agreement with Local 142, and that, accordingly, the Employer rendered unlawful aid, assistance, and support to Local 142 in violation of Section 8(a)(2) of the Act.[1] Among other things, the Board ordered the Employer to withdraw recognition from Local 142 unless and until it was certified by the Board as the exclusive representative of the employees involved, and that the election conducted herein be set aside and a second election be held pursuant to its direction.

On November 26, 1974, the United States Court of Appeals for the Ninth Circuit denied the Board's petition for enforcement of its order in the related unfair labor practice matters, finding that no question concerning representation existed at the time the Employer recognized and entered into a contract with Local 142, and concluding, therefore, that the rights of the employees to select and bargain through their own representatives prevailed over the Board's desire to protect the integrity of its election machinery.

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[1]The Board also found the other violations alleged in the consolidated complaint.

The Board having duly considered the instant petition in the light of the Court's decision in the related unfair labor practice cases, a decision which the Board finds itself constrained to accept as the law of said cases, and having determined that no useful purpose would be served in further processing the petition herein.

It Is Hereby Ordered that Case 37-RC-1711 be, and it hereby is, severed from Cases 37-CA-689 and 37-CB-147, and that the petition in 37-RC-1711 be, and it hereby is, dismissed without prejudice to the Petitioner herein.

Dated, Washington, D. C., February 26, 1975.

By direction of the Board:

George A. Leet
Associate Executive Secretary